IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-70

FEDERAL TRADE COMMISSION,
Petitioner,

v.

THE SPERRY AND HUTCHINSON COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Statement

Respondent, The Sperry and Hutchinson Company (hereinafter called "S&H"), submits the following statement of facts to supplement those set forth in petitioner's brief.

S&H has been engaged in the trading stamp business since before the turn of the century (App. I, 104-05). The object of the business is to promote the sales of retail merchants who subscribe to the S&H system. For a fee, measured by the number of stamps taken, S&H licenses the retail merchant to issue its stamps to his customers in connection with their purchases. The customer pastes the stamps in a collector's book, and when the customer has

collected one full book (1,200 stamps) S&H redeems the stamps for merchandise which the customer selects at one of S&H's redemption centers or chooses from S&H's catalogue (App. I, 32, 106). In the words of the court below: "The purpose of S&H's service is to enable its licensees to increase and to maintain their sales by attracting customers and inducing those customers to return, again and again, until they have collected enough stamps to secure the redemption articles of their choice" (App. III, 389).

S&H is not the only trading stamp company in the United States. There are up to 400 in all, of which S&H is the oldest and largest (App. I, 104, 110). It maintains nine regional warehouses, over 850 redemption centers, and spends millions of dollars annually to advertise its system and its redemption merchandise (App. I, 104).

The success of the promotional service which S&H provides and for which its licensees pay depends upon three things: first, the licensee must be unique in his trading area in his ability to offer S&H stamps; second, the customer must fill at least one book with stamps before she becomes entitled to redeem them for merchandise; and third, to redeem her stamps she must visit an S&H redemption center where she will become acquainted with the attractive, high quality merchandise which she will thereafter associate with S&H stamps and the stores where she received them (App. I, 97, 99, 107-108). In other words, the customer's interest must be aroused so that she will return again and again to S&H licensees until, and after, she has filled at least one book with stamps.

Throughout S&H's history non-licensed retailers and stamp brokers have attempted to acquire, exchange and make other commercial use of S&H stamps for their own benefit without S&H's authorization (App. I, 119; App. III, 333). If S&H could not obtain judicial relief from such trafficking in its stamps, the stamps would no longer serve

their essential purpose of attracting customers to the retail stores which are licensed to issue them (App. I, 78). If the competing merchant across the street from an S&H licensee were free to offer to redeem S&H stamps for his own stamps or to accept S&H stamps as full or part payment on goods purchased (*see* App. I, 119-20), the S&H system would be attracting customers *away* from the S&H licensee who has paid for the service and would become an instrument to introduce the customers to the store of the competitor (App. I, 119; App. III, 210, 250-51). The stamps would then lose their promotional purpose of encouraging continued patronage and the incentive for the S&H-licensed merchant to use S&H stamps would disappear. By using S&H stamps in such a manner, the unlicensed merchant would not only acquire free use of the S&H system for his own benefit but would also frustrate and interfere with S&H's ability to provide licensed merchants with the effective promotional system for which they have contracted.

In a similar fashion, the S&H promotional service would be defeated and its licensed merchants deprived of the advantage for which they have paid if, instead of having to return to them to fill their books, their customers could stop in at a trading stamp exchange and buy, with cash or other stamps, the S&H stamps they need. As the hearing examiner found:

> "Moreover, as a matter of common knowledge, it must be recognized that since the promotional service sold by respondent is one designed to bring customers into a licensee's store by the issuance of a popular S&H stamp, this design cannot be realized in the long run if a customer can get the popular S&H stamp at an exchange by surrendering a different stamp secured at some other store . . . ." (App. I, 61).

The examiner found that unrestricted redemptions and other dealings in S&H trading stamps would seriously

injure and could ultimately destroy the trading stamp business:

> "If stamps can be traded, the attraction of the customer to a licensee's store caused by the issuance of S&H stamps is destroyed. The customer can trade anywhere and exchange other stamps for S&H. Thus the licensee does not get what he pays for." (App. I, 76).

The examiner concluded that S&H's procedure with respect to unauthorized use of its stamps "is inherently essential to carrying out the purpose of the promotional scheme" (App. I, 61).

Whenever unauthorized trafficking in S&H stamps has come to its attention, S&H has followed a uniform procedure of seeking the aid of the courts to stop the practice. The procedure normally involves, first, a letter written by S&H's attorneys to the offender warning him that he is trespassing upon S&H's rights and informing him that S&H intends to seek an injunction if the practice does not stop (App. I, 120). S&H supplies citations to the legal authorities which have unanimously supported its position, with the hope that the offender will voluntarily discontinue the unauthorized use (*see* App. II, 295, 306). If the trafficker persists, it is the practice of S&H to seek an injunction (App. I, 120-21).

The irreparable injury to S&H resulting from unauthorized redemptions and use of its stamps and the unfair competition which is inherent in such trafficking have been recognized for more than 60 years by courts throughout the country which have granted equitable relief against the unauthorized use of trading stamps (App. II, 588-92).[1]

1. From 1904 to 1966, S&H was involved in 43 actions in eight federal districts and 19 states to enjoin the unauthorized use of trading stamps. Each of the 43 cases resulted in an injunction against the defendant (App. II, 588-92).

In addition, such unfair competition has engendered legislation in four states declaring unauthorized use of trading stamps to be unlawful. Cal. Bus. and Profs. Code §17761 (West 1964); Conn. Gen. Stat. Ann. §42-126a(g) (Supp. 1969); Ind. Stat. Ann. §58-705 (Burns 1961); N.J. Rev. Stat. §45:23-11 (Supp. 1971).

The Commission determined that trading stamps are "a viable means of competition at the retail level" and "have become an integral and important part of retailing in America" (App. I, 160). But the Commission, reversing the hearing examiner's decision which had upheld S&H's practices, held that S&H's policy of seeking judicial relief from the unauthorized use of its stamps had "restrained trade and had severe anti-competitive effects in the marketplace" (App. I, 176).

Petitioner's brief states:

> "The Commission recognized the distinction between reissuance and exchange [of trading stamps]. Under its order, S&H is not foreclosed from preventing a non-licensed retailer from acquiring S&H stamps in order to redispense them in connection with the sale of goods or services." (Pet. Br. 42).

The Commission thus recognized that S&H's restriction on the unauthorized reissuance of its stamps by competitors of its licensees was justified because of "the unfair aspects of reissuance" *(id.)*. However, the Commission rejected the examiner's findings of fact concerning the equally unfair and serious injury to S&H resulting from the diversion of customers of its licensees by their competitors who, under the Commission's order, would be free to redeem S&H stamps.

The court of appeals set aside the Commission's order (App. III, 404). While agreeing that the injunctions issued by state and federal courts had "no doubt injured the businesses of the traffickers," the court stated that "the Commission cannot rest its case solely on the determination that injury to a competitor exists" (App. III, 391). The court held that to be "unfair" within the meaning of Section 5 of the Federal Trade Commission Act an allegedly anticompetitive practice "must be more than a mere restraint of competition. . . . The Commission should at least determine that the practice violates the policy or spirit of the antitrust law" (App. III, 393). The court added: "Considerable importance should be given to the fact that while permitting a small group of businessmen to operate a business the legality of which has been rejected by the Courts the Commission order would itself restrain competition between S&H and other stamp companies" (App. III, 393). Since the Commission was unable to point to any antitrust law which S&H had violated either in letter or spirit, the order was set aside (App. III, 394).

Summary of Argument

The opinion of the court below does not limit Section 5 to conduct which violates the letter or spirit of the antitrust laws. This Court has held that Section 5 applies to conduct falling into three general categories: (1) anticompetitive acts which violate the letter or spirit of the antitrust laws, (2) deceptive practices, and (3) inherently unfair practices. The Commission based its decision on category (1), and the court below reviewed it on the same basis, as it was required to do. Its decision, therefore, does not affect the Commission's jurisdiction over conduct in

other areas. Since the court's analysis under category (1) was correct and has not been challenged by petitioner, that decision should be affirmed (Point I, *infra*).

In this Court, petitioner argues for the first time that S&H's efforts to prevent unauthorized use of its stamps should be condemned because they are unfair to consumers, regardless of whether they are also anticompetitive. The legislative history of Section 5 establishes that Congress intended the term "unfair," when applied to conduct other than anticompetitive or deceptive activity, to mean immoral, unethical or unscrupulous conduct, and the Commission and courts have consistently interpreted the statute in this manner (Point IIA, *infra*).

S&H's action in seeking injunctive relief in the courts from unfair competition did not violate any established concept of unfairness, nor was it morally objectionable. To the contrary, it is unauthorized traffickers in stamps whose activities have long been held unfair (Point IIB, *infra*).

The hearing examiner properly found, on the basis of the uncontroverted testimony of witnesses for both S&H and the Commission, that unauthorized commercial use of S&H stamps would destroy the effectiveness of the S&H system. The Commission erroneously rejected this finding (Point IIB(1), *infra*).

The conditions placed by S&H on the use of its trading stamps are clearly reasonable. Appellate counsel attempt to demonstrate, without benefit of findings by the Commission, that S&H has harmed consumers by limiting their freedom of choice, but counsel have been unable to point to any substantial injury to consumers or others. While the uniformly successful legal actions brought by S&H have obviously been detrimental to trading stamp exchanges, a

court action to obtain an injunction to end an unfair practice which interferes with a legitimate business operation is not an unfair act or practice (Point IIB(2), *infra*).

Over a period of more than 60 years, the courts have issued injunctions against those who engage in unauthorized dealing in trading stamps. It has been held that such traffickers are engaged in unfair competition and interfere with and damage S&H's promotional system. The Commission improperly failed to consider these decisions, despite the fact that they form a body of law important to a proper interpretation of Section 5 in this case (Point IIB(3), *infra*).

In urging this Court to reinstate the Commission's order on the new ground of alleged unfairness to consumers, counsel for petitioner would have this Court uphold the order of the Commission on a basis not relied upon by the Commission in its findings or opinion. Petitioner would thus violate the principle that *post hoc* rationalizations by counsel may not be substituted for agency action and that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the grounds invoked by the agency (Point III, *infra*).

ARGUMENT

POINT I

The court below correctly analyzed and decided the case on the basis of the record before it.

The first "Question Presented" by petitioner is whether Section 5 of the Federal Trade Commission Act "is limited to conduct which violates the letter or spirit of the antitrust laws" (Pet. Br. 2). Section 5 has never been thus limited, and the opinion of the court below does not do so.

The Federal Trade Commission has been held by this Court to have jurisdiction under Section 5 in three separate areas: (1) acts and practices restricting competition which violate the letter of the antitrust laws or "bear the characteristics of recognized antitrust violations,"[2] or which "when full blown, would violate [the Sherman or Clayton] Acts;"[3] (2) deceptive practices;[4] and (3) inherently unfair or unethical practices.[5]

This case, in the decisions of both the Commission and the court of appeals, was consistently regarded as one which should be determined within the framework of the first of the above three categories. It was the Commission, not the court below, which first cited and relied upon cases such as *Atlantic Refining Co.* v. *FTC* and *FTC* v. *Brown Shoe Co.*, to emphasize its broad power "with regard to trade practices which conflict with the basic policies of the

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2. Atlantic Refining Co. v. FTC, 381 U.S. 357, 369-70 (1965).

3. FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 394-95 (1953); FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966).

4. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922).

5. FTC v. R. F. Keppel & Bro., 291 U.S. 304 (1934).

Sherman and Clayton Acts" (App. I, 150), and it was the Commission which stated in its opinion that "[w]e will look to comparable statutes, if any, for guidance" in determining "if competitive activity has been or may be impaired" (App. I, 151).[6] Nowhere in its opinion did the Commission suggest that S&H's activities are deceptive or inherently unfair, and no case dealing with such categories was mentioned in its opinion.

Thus, it was only in the context of an alleged restraint on competition violative of the letter or spirit of the antitrust laws that the case was decided by the Commission and presented to the court below for review. It was both natural and proper that the court below should decide the case in the same context. As this Court said in *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1942):

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

In its opinion, the court below noted (App. III, 392-93) that this Court has held that anticompetitive practices may

6. The Commission continuously emphasized in its opinion that it was deciding the matter on the basis of whether S&H had restrained competition. It considered "possible harm to competition" caused by S&H's practices and their "competitive effects" (App. I, 174) and the "broad competitive questions presented" (App. I, 175). It reiterated that "[i]t is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of competition" (App. I, 175); and it then turned "to the evidence which the record may contain as to the competitive effects of the restrictions . . ." (App. I, 176). The Commission stated that S&H's practices "restrained trade and had severe anticompetitive effects in the marketplace" (*id.*) for the reason that "trading stamp exchanges suffered a serious loss of business" (App. I, 176) and the restraints upon unauthorized redeeming retailers "restrained trade at the retail level" (App. I, 177). It said "[o]ur approach to the matter is to look first at the activity . . . and to determine whether such is anticompetitive . . ." and it found S&H's action "has adversely affected competition" (App. I, 180). Thereupon, it pronounced its holding that S&H "engaged in limiting competition in the use of trading stamps . . ." (*id.*).

violate Section 5 even though they do not violate the antitrust laws if they have "'the characteristics of recognized antitrust violations,'" citing *Atlantic Refining Co.* v. *FTC* and *FTC* v. *Brown Shoe Co.* Applying this test in its broadest form, the court below stated that with regard to conduct alleged to be unduly restrictive of competition the "Commission should at least determine that the practice violates the policy or spirit of the antitrust law" (App. III, 393). The court went on to hold that the facts in the record did not support a conclusion by the Commission that S&H's actions in seeking judicial relief against traffickers in trading stamps violated the policy or spirit of the antitrust laws (App. III, 394). Since the court's decision dealt solely with practices alleged to be an unlawful restraint on competition, it in no way affected the Commission's power over conduct challenged on the grounds that it may be deceptive or inherently unfair.

The court of appeals correctly considered and decided the case on the basis of an alleged restraint upon competition. In that context, the court of appeals decision has not been challenged by petitioner, and it should be affirmed.[7]

7. It might also be noted that if this Court were to conclude that the court of appeals misapprehended the reach of Section 5, then the remedy plainly would be to send the case back to the Fifth Circuit for reconsideration in the light of a correct statement of law. "The reviewing function has been deposited not here, but in the Court of Appeals, as the *Universal Camera* case [340 U.S. 474, 490-91] makes clear." NLRB v. Walton Mfg. Co., 369 U.S. 404, 408 (1962). *See also* FTC v. Borden Co., 383 U.S. 637, 647 (1966); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 542, 554 (1960).

POINT II

S&H's actions to prevent unauthorized commercial dealing in its trading stamps were not unfair within the meaning of Section 5.

As noted in Point I, the Commission has been held to have jurisdiction under Section 5 over (1) restraints on competition, (2) deceptive practices, and (3) inherently unfair or unethical practices. Although the Commission and the court below decided the case under category (1), petitioner in its brief to this Court has abandoned the contention that S&H's activities violated the letter or spirit of the antitrust laws. Neither of the questions presented raises this issue, nor is there any argument in the brief that such a violation has been shown to exist. Instead, petitioner now argues that S&H's practices are "unfair to consumers, regardless of whether they also are anticompetitive" (Pet. Br. 15, 27) and even though they are concededly not deceptive (*id.* at 23-24). Petitioner places no limits on the Commission's authority to declare business practices to be "unfair" under Section 5.

A. Standards to Be Applied in Determining Whether a Practice Is Unfair Under Section 5.

We do not question that the Commission's authority under Section 5 is indeed broad. However, a review of the legislative history of the 1914 Act, the 1938 amendment, and the Act's enforcement during the 57 years since its enactment makes clear that the Commission's power over practices which are allegedly unfair to consumers is not without reasonable limitations.

1. Legislative History of the 1914 Act.

Petitioner's brief discussion of the legislative history of the 1914 Act (Pet. Br. 18-19) may create the impression

that it was Congress' purpose to give the Commission unlimited authority to declare any business practice unfair. This was, indeed, the fear of some. For instance, on the opening day of the debate Senator Thomas of Colorado stated:

> "My construction of this term is that if we enact this measure into a law the commission to be appointed afterwards will have the absolute power, subject only, of course, to the ultimate determination of the legality of the act by the courts, of arbitrarily determining whether any act submitted to it is or is not unfair competition, whether that act is one which involves no competition or one which involves actual competition, and that as a consequence we are imposing upon the business world a condition almost similar to that which resulted during the Middle Ages in a declaration that all unbelief should be heresy." 51 Cong. Rec. 11103 (1914).

The proponents of the bill, however, assured its critics that their fears were unfounded. For example, Senator Cummins, one of the bill's chief sponsors, responded to Senator Thomas that "we do not give to the trade commission an unlimited, unbridled license or authority to declare anything unfair competition." 51 Cong. Rec. 11104.

Undoubtedly, the principal targets of the Act were practices which would lead to antitrust violations or the creation of monopolies. Thus, Senator Newlands, Chairman of the Interstate Commerce Committee, which reported the Senate bill, expressed his belief that "every new condition and every practice that may be invented with a view to gradually bringing about a monopoly" would be covered. 51 Cong. Rec. 12024. The supporters of the bill, however, intended it also to comprehend all clearly unconscionable or unethical practices, not merely those which would produce antitrust violations.

Senator Newlands emphasized repeatedly that while it would be impossible to specify all possible forms of unfair competition, only "practices that are against good morals in trade," 51 Cong. Rec. 11084, or "good morals in business," 51 Cong. Rec. 11108, would be covered. He expanded this to include "every practice and method . . . that is against public morals . . . or is an offense for which a remedy lies either at law or in equity." 51 Cong. Rec. 11112. In response to Senator Sutherland's criticism, Senator Newlands refined his definition:

> "The Senator objects to the term 'public morals' or 'good morals' as a test. I think it is a very good test. I think there are certain practices which shock the universal conscience of mankind, and the general judgment upon the facts themselves would be that such practices are unfair." 51 Cong. Rec. 12980.

He then referred to "the numerous fraudulent practices which constitute unfair competition." *Id.*

Senator Robinson, who supported the bill in the Senate Committee on Interstate Commerce and also upon the floor of the Senate, stated that the term "unfair competition" was not limited to palming off but would embrace "every unjust, dishonest, and inequitable practice by which one seeks to unfairly destroy or injure the business of a competitor." 51 Cong. Rec. 11228. He stressed that "[n]ot only has the term 'unfair competition' a meaning fairly well fixed in law and economics, but it is also easily understood by the average business man." Senator Robinson felt that the "distinguishable characteristics" of this term were "oppression or advantage obtained by deception or some questionable means." 51 Cong. Rec. 11231.

Senator Saulsbury, another supporter of the bill, stated that unfair methods of competition would include violations of recognized business standards of fairness:

> "Courts have always recognized the customs of merchants, and it is my impression that under the act the commission and the courts will be called upon to consider and recognize the fair and unfair customs of merchants, manufacturers and traders. . . .
>
> . . . Every man in his own business knows when a competitor is pursuing unfair methods. Every professional man knows when a competitor is guilty of unfair, unprofessional, and unethical conduct." 51 Cong. Rec. 11593.

Senator Hollis, the author of the term "unfair methods of competition," stated:

> "Nobody defends unfair competition. . . . [Senator Reed] calls it a rascally practice; and that is a good, vigorous description of it. Only the pirates of business, who desire monopoly, have an interest in its continuance. Everybody else wants to have it stopped. The only question is as to the best way of stopping it with the least risk to legitimate business operations." 51 Cong. Rec. 12147.

Senator Colt concluded, in a careful analysis, that the phrase "unfair competition," as used in the bill, was "capable of four different constructions by a court": (1) that it was used in the legal sense, *i.e.*, limited primarily to palming off; (2) that it raised a "moral question," *i.e.*, whether conduct was "disingenuous or tricky"; (3) that the words referred to "transactions regarded as unfair according to the customs and usages of merchants or in trade generally"; and (4) that the law covered all antitrust violations "and all transactions of a similar nature." 51 Cong. Rec. 13154.

The principal spokesman for the bill in the House was Representative Covington, one of the House Conference managers and chairman of the subcommittee in charge of the bill. In an extensive analysis of the phrase "unfair

methods of competition" after the bill had returned from conference in its final form, Representative Covington explained that it was Congress' purpose to have the Commission, in applying the statute to new and different types of unfair practices, build upon the basic principles of common law which had been developed by the courts. He concluded that:

> ". . . while most of the earlier cases related to the infringement of trademarks, the term may be said now to embrace those unjust, dishonest, and inequitable practices by which one seeks to destroy or injure the business of a competitor." 51 Cong. Rec. 14929.

One of the methods referred to which had been condemned under the common law was interference with or obstruction of the business of a competitor. Quoting from *Nims on Unfair Business Competition* (p. 385), Representative Covington noted that such methods were not limited to interference with a competitor's contract, but also included "many other ways . . . of harassing, interfering with, and obstructing a competitor in such a manner as to amount to unfair competition in the broadest sense of the term." The first case cited by Representative Covington in support of this proposition was *Sperry & Hutchinson Co.* v. *Louis Weber & Co.* 161 F.219 (C.C.N.D. Ill. 1908), in which, as he stated, "the complainant was held entitled to an injunction to prevent defendant from interfering with its business of issuing trading stamps. . . ." 51 Cong. Rec. 14930. It is indeed ironic that petitioner is seeking to condemn legal action against conduct which Congress considered an unfair method of competition.

The types of practices which Congress intended to be covered by the Act may be grouped into two categories: those which would be in the nature of antitrust violations

and conduct which would be plainly recognizable by the business community and by the public to be dishonest or otherwise inequitable or immoral. In every example given or case cited in the consideration of the legislation, the perpetrator of the act in question had taken some kind of patently unfair and improper advantage of his competitors and/or of the consuming public. The words and phrases used in describing Section 5 all convey an idea of clear unfairness: "practices that are against good morals in trade . . . which shock the universal conscience of mankind"; "imposture"; "vicious practice"; "unjust, dishonest and inequitable"; "foul"; and "fraudulent".

2. The Wheeler-Lea Amendment.

Petitioner incorrectly implies (Pet. Br. 21-22) that the Wheeler-Lea Amendment in 1938 was intended to expand the Commission's power to protect consumers from practices not previously covered by Section 5. While the legislative history of the 1914 Act had focused largely on unfair methods of competition—*i.e.*, unfair acts directed against competitors—the Commission, even prior to the Wheeler-Lea Amendment, devoted a substantial portion of its efforts to practices aimed primarily at consumers.[8] In the first such case to reach this Court, *FTC* v. *Winsted Hosiery Co.*, 258 U. S. 483, 494 (1922), it was held that misbranding of goods was an "inherently unfair" method of competition. Although the Court found that competition was injured by the practice since "trade [was] diverted from the producers of truthfully marked goods," the Court recognized that the principal victim was the public. The practices, it stated,

8. In the two fiscal years preceding 1932, 521 out of 572 FTC proceedings, or 91 percent, were concerned with false and misleading advertising, misbranding and misuse of trade names. Watkins, The Federal Trade Commission and the Antitrust Laws, The Federal Antitrust Laws, A Symposium (M. Handler ed. 1932).

were "calculated to deceive and do in fact deceive a substantial portion of the purchasing public. . . . As a substantial part of the public was still misled by the use of the labels which the Winsted Company employed, the public had an interest in stopping the practice as wrongful. . . ." 258 U. S. at 493-94.

In *FTC* v. *R. F. Keppel & Bro.*, 291 U. S. 304 (1934), decided four years before the Wheeler-Lea Amendment, the sale of merchandise by a lottery scheme had been condemned on the ground that it had been "shown to exploit consumers."

Accordingly, there would have been no need for a change in the statute if the purpose had been to include practices harmful to consumers, since they were already indisputably covered. The only reason for the amendment was to eliminate the technical requirement imposed in *FTC* v. *Raladam Co.*, 283 U. S. 643, 652-53 (1931), that under Section 5 the Commission must demonstrate that a practice even though clearly injurious to consumers has also "substantially injured or tended thus to injure, the business of [a] competitor or competitors generally."[9] Contrary to petitioner's intimation (Pet. Br. 22), the Wheeler-Lea Amendment did not expand the substantive scope of the acts prohibited under Section 5 but only provided that those acts could be moved against irrespective of whether they had an effect upon competition.

9. The Senate Committee felt that the "necessity of proving that competitors of the offender have suffered monetary damage" placed an unnecessary burden on the Commission. S. Rep. No. 1705, 74th Cong., 2d Sess. 2 (1936). The House Committee pointed out that under the Act, as interpreted, the Commission may have been powerless to act where a person had a monopoly or "where all of those engaging in a particular line of commerce are participating in the same unfair method." H. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937). The Court in *Raladam* had raised this possibility: "Certainly it is hard to see why Congress would set itself to the task of devising means and creating the administrative machinery for the purpose of preserving the business of one knave from the unfair competition of another." 238 U. S. at 652.

In his testimony before the Senate Committee on Interstate Commerce, Federal Trade Commissioner Ewin Davis stressed that the proposed amendment would not increase the power of the Commission but would merely relieve it of the burden of establishing injury to competition resulting from an unfair practice:

> "We do not think that [the amendment] increases the power of the Commission at all. We simply think that it defines it in a way that the Commission can proceed without proving competition and injury to competitors, and thus more easily, speedily and economically, and better protect the consuming public and industry. Now, the word 'unfair' is already in the act. So far as the word 'unfair' is concerned, that has been defined hundreds of times in the courts. There are few words which have been more clearly and definitely defined than the word 'unfair' and so far as the word 'deceptive' is concerned, why, that is clear in itself." *Hearings on S. 3744 Before the Senate Comm. on Interstate Commerce,* 74th Cong. 2d Sess. at 52 (1936).

Senator Wheeler confirmed Commissioner Davis' understanding that the bill conferred no new powers upon the Commission:

> "The present bill is a re-enactment of the present law upon the statute books with comparatively few amendments which the Federal Trade Commission has recommended, not for the purpose of adding to their powers but for the purpose of aiding them in carrying out their present powers." 80 Cong. Rec. 6589 (1936).

Because the only purpose of the amendment to Section 5 was to eliminate the necessity of showing injury to competition, no one ever considered the possibility that a claim might be made that it covered different types of practices.

The words "acts or practices" were not used by the Commission in drafting the proposed measure to indicate that different forms of conduct would be covered. As Commissioner Davis testified:

> "[T]he courts have very frequently referred to them as 'unfair practices,' and the reports, congressional reports, submitting the bill which became the Federal Trade Commission Act, stated specifically that it was designed to prevent 'unfair practices.' They used that term then, and the Courts have frequently referred to it in the same way. In other words, that is what was meant by 'unfair methods of competition.'" *Hearings on S. 3744, supra,* at 13.

Accordingly, Congress did not intend to give the Commission broadened substantive powers, as petitioner suggests, but merely the authority to challenge the same types of practices against which it had been proceeding for over 23 years—but without having to show competitive injury.

3. Enforcement and Interpretation of Section 5 by the Commission and the Courts.

Petitioner relies upon cases in which the Commission has held that the Act applies to practices which are neither deceptive nor in the nature of antitrust violations. A reading of petitioner's summary of those cases (Pet. Br. 24-25) discloses that in every one the practice challenged was patently and inherently unfair and unethical.[10]

Only one such case has reached this Court, *FTC* v. *R. F. Keppel & Bro.,* 291 U. S. 304 (1934). As petitioner notes,

10. The practices in the cases cited by petitioner include the sale of goods by lottery or other games of chance; the delivery of unordered goods or attempting to force customers to accept substitutes; coercing payments for unordered goods by harassing tactics; refusing to reassemble a furnace which respondent had improperly dismantled; commercial bribery and "payola"; and refusal to return deposits or make refunds.

"[s]ince *Keppel,* this Court has not specifically considered a case, like the present one, in which the claim of unfairness is not based essentially upon alleged deceptiveness" (Pet. Br. 24). In *Keppel* respondent sold candy by means of "break and take" packages whereby customers were induced by the element of chance to make purchases. The Commission had found, among other things, that this was "a lottery or gambling device which encourages gambling among children"; "that in some states lotteries and gaming are penal offenses"; and "that the sale or distribution by lot or chance is against public policy." 291 U. S. at 308. The Court held:

> ". . . the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. *Such devices have met with condemnation throughout the community.* Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that *the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy.*" 291 U. S. at 313 (emphasis added).

Petitioner also refers (Pet. Br. 19) to Mr. Justice Brandeis' dissenting views in *FTC* v. *Gratz,* 253 U. S. 421 (1920), which subsequently were accepted by this Court. *See FTC* v. *Brown Shoe Co.,* 384 U. S. 316, 320-21 (1966). Both *Gratz* (which involved a tie-in practice by a company holding "a dominating and controlling position" in the sale and distribution of the tying product) and *Brown Shoe,* however, concerned anticompetitive practices which conflicted with the basic policies of the Sherman and Clayton Acts. Neither case supports petitioner's contention herein that S&H's

practices should be condemned regardless of whether they violate the letter or policy of the antitrust laws.

In its authoritative statement accompanying the Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes, issued on June 22, 1964, 29 Fed. Reg. 8324 (1964) the Commission listed the factors which it felt should be considered in determining whether a practice (neither in the nature of an antitrust violation nor deceptive) is unfair:

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). If all three factors are present, the challenged conduct will surely violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and *if, in addition to be morally objectionable, it is seriously detrimental to consumers or others.*" 29 Fed. Reg. at 8355 (emphasis added).

In a leading decision on its powers in the area under consideration, *Topps Chewing Gum, Inc.*, 67 F.T.C. 744 (1965), the Commission, per Commissioner Elman, stated:

> "The prohibition in Section 5 of unfair methods of competition and unfair acts and practices has long been construed to reach not only monopolistic and anticompetitive practices, but also *trade practices that are unscrupulous, oppressive, exploitive, or otherwise indefensible.* Thus, such practices as com-

mercial bribery, inducing breach of competitors' contracts, physical interference with competitors' goods or property, and industrial espionage are forbidden by Section 5 regardless of whether there has been a general adverse effect on competition." 67 F.T.C. at 841 (emphasis added).

Thus, the Commission as well as the courts have interpreted the Act in a manner entirely consistent with the view expressed during the Congressional debates. Only practices (other than those which are deceptive or in the nature of antitrust violations) which are "inherently unfair," because they have been "long deemed contrary to public policy," "morally objectionable," "unethical," "unscrupulous," "oppressive, exploitive, or otherwise indefensible," have been attacked by the Commission or deemed by it or the courts to be covered by Section 5. The most comprehensive approach which has been adopted for measuring whether or not a practice which is neither in the nature of an antitrust violation nor deceptive should be considered to be unfair within the meaning of Section 5 is that set forth by the Commission itself, as quoted on page 22, *supra, i.e.*: (1) whether the practice is within "the penumbra of some common-law, statutory or other established concept of unfairness"; (2) whether it is "immoral, unethical, oppressive, or unscrupulous"; or (3) whether *"in addition to being morally objectionable,* it is *seriously detrimental* to consumers or others." (Emphasis added.)

B. S&H's Actions Were Not Unfair Under Section 5.

Under the standards articulated during the Congressional debates and applied by the Commission and the courts since the enactment of the statute, S&H's efforts to prevent unauthorized dealing in its trading stamps—as evidenced by the institution of legal proceedings and by

letters from attorneys warning in good faith that such actions would be brought—were not unfair acts and practices within the meaning of Section 5.

(1) S&H's actions were obviously not in violation of the common law or any other established concept of unfairness. In contrast to the *Keppel* case, where the practice in question was held to be clearly "of the sort which the common law and criminal statutes have long deemed contrary to public policy," 291 U.S. at 313, S&H's right to protect itself from unauthorized commercial use of its stamps has been uniformly sustained by all of the federal and state courts which have considered the issue.[11]

The legislative history of Section 5 set forth above makes clear that while Congress did not consider that the Commission should be strictly limited to the common law definition of unfair competition, it believed the Commission should rely on the case law decisions on unfair competition as significant factors in interpreting this section. At a minimum it was intended that the Commission should treat as unfair methods of competition those acts which had been held at common law to be unfair competition. As noted above, one of the practices which the Act was designed to cover was the unauthorized trafficking in trading stamps, held to be "a clear case of unfair competition" in *Sperry & Hutchinson Co.* v. *Louis Weber & Co.*, 161 F.219, 222 (C.C.N.D. Ill. 1908). The authors of the legislation undoubtedly would have found it inconceivable that some day a claim would be made that steps taken by S&H to enjoin conduct which was recognized to be unfair at common law would be considered to be unfair under Section 5.

(2) No finding was made by the Commission nor has any claim been made by petitioner that S&H's actions were immoral, unethical, unscrupulous or otherwise unfair in

11. See the discussion of these cases at pp. 40-47, *infra*.

the sense that this word was used in the Congressional debates and has been subsequently applied by the Commission and the courts. S&H's conduct is totally unlike any of the practices referred to by Congress or previously attacked by the Commission.

While the institution of vexatious litigation brought in bad faith has been held to be an unfair practice (*see Chamber of Commerce* v. *FTC,* 13 F.2d 673, 686 (8th Cir. 1926)), it cannot be said that S&H's litigation was designed to harass or that it was not instituted in good faith in view of the fact that S&H has been uniformly sustained by the courts.

(3) Petitioner has failed to show that the practice of S&H is "unfair" within the meaning of Section 5 as reflected in its legislative history, or its interpretation by the courts and the Commission. Petitioner asks this Court to promulgate some entirely new rule which petitioner has chosen not to define. Petitioner urges that S&H's actions were unfair primarily because they were injurious to consumers by limiting their "freedom of choice in the disposition of trading stamps" (Pet. Br. 28). Reduction of a consumer's freedom of choice, however, cannot in itself be found to be consumer "injury" nor render a practice unfair. Where, as here, there is no violation of the letter or spirit of the antitrust laws, deception or inherent unfairness, and where the practice is reasonably necessary to fulfill legitimate business objectives, and produces no "substantial" or "seriously detrimental" effect upon consumers or others, such practice cannot be considered to be unfair.

1. S&H's Actions Have Been Reasonably Necessary for the Protection of Its Business and to Prevent Unfair Competition With S&H and Its Retailer Licensees.

The effectiveness of the S&H stamp service in inducing long-term patronage at its licensees' stores depends on the fulfillment of three reasonable conditions: (1) the stamps

may be obtained only at the stores of S&H licensees; (2) the consumer must fill a book of stamps before redeeming them; and (3) to redeem her stamps the consumer must visit an S&H redemption center (unless she does not live within a reasonable distance of a redemption center), where she becomes acquainted with the variety and high quality of merchandise made available and may secure goods which she will thereafter associate with S&H stamps and the stores where she received them.

Unauthorized redemption of and trading in stamps for commercial purposes interfere with every aspect of this system. The consumer may thereby obtain stamps through other sources and therefore need not patronize S&H licensees to secure them. The consumer may dispose of her stamps before filling a book and thus does not have the incentive to return to the stores of the licensees to obtain the additional necessary stamps. The consumer need not visit a redemption center because she may redeem or trade her stamps at a competitive retail merchant or at an exchange, and she does not receive for her stamps the merchandise provided by S&H.

The harm caused to S&H and its licensees by unauthorized trading in and redemption of S&H stamps is particularly obvious in the case of a retail merchant who in competition with an S&H licensee offers to redeem S&H stamps for his own merchandise or to exchange S&H stamps for his own stamps. As the Commission found, the purpose of this activity is "to lure customers" from the S&H retailer into the store of such competitor (App. I, 119). The competitor, who has paid nothing for the S&H service, would be able to use the S&H stamps to increase his own business at the expense of the S&H-licensed merchant who has paid for the S&H service. Under the Commission's order the competitor would be free to take the stamps to an S&H redemption center and obtain redemption merchandise which he may then use to redeem more S&H stamps.

As the court below stated: "Upon the basis of exhaustive analysis of the evidence of record and personal observation of the demeanor of the witnesses, the Examiner concluded that serious damage would be visited upon S&H through commercial trafficking in S&H stamps and that the action of S&H alone in stopping that activity was inherently essential to the conduct of the trading stamp business" (App. III, 393-94, n. 6).

Those findings were established by the testimony of Frank P. Rossi, S&H Senior Executive Vice President (App. III, 302-20); Dr. Eugene Beem, S&H Vice President for Corporate Research and Economist (App. III, 345-67); and Dr. Charles F. Phillips (App. III, 376-85).[12] Three witnesses called by complaint counsel and two others called by S&H testified to the same effect (App. III, 176-77, 210, 250-51, 323-24, 370-71). Additionally, Dr. Stewart Lee, who testified as the Commission's economic expert (App. III, 258), agreed that unrestricted trafficking in S&H stamps would be injurious to S&H and its licensees (App. III, 266-67, 276).

As Dr. Phillips noted, the S&H promotional system comprises a circular relationship from S&H to the retailer to the consumer and back to S&H (App. III, 382-84), and "if you break the relationship between the consumer and the redemption center [by allowing commercial trafficking in stamps], you have broken an essential ingredient of this system" (App. III, 384-85).

Witnesses Rossi and Beem explained that when stamp savers can acquire S&H stamps at a trading stamp exchange without patronizing merchants licensed by S&H, the ability of the S&H system to attract customers to the licensee's store is defeated, and the licensee does not receive the kind of program he has paid for (App. III, 314, 353-54). Dr. Beem added that, when consumers dispose of their stamps

12. The hearing examiner noted that he "was impressed with the candor of respondent's officials and with their experience in the trading stamp business. Thus, he credited their opinion of the effects which would flow" from unauthorized commercial trafficking in S&H stamps (App. I, 80 n.14).

at an exchange and thus fail to visit the S&H redemption center, S&H loses the consumer appeal which comes when the stamp saver is exposed to the variety and quality of S&H redemption merchandise, the attractive S&H redemption store and its courteous personnel (App. III, 356). "This," as Dr. Beem put it, "is what sells the Sperry and Hutchinson program" (*id.*).

The Commission brushed aside the evidence as to the validity of the reasons for S&H's actions on the ground that it consisted of "testimony from its own officers and employees," "in broad generalities" and without supporting "hard facts" (App. I, 172).

The testimony supporting S&H's position was in fact not limited to "its own officers and employees." Dr. Stewart Lee, the Commission's expert witness, agreed that "from the point of view of the retail licensee who pays for the stamps, you have to have a system under which he gets the use of it but his competitor does not" (App. III, 266-67); that "to make that business a success, it has to be so regulated that the stamp will be used as a magnet to draw the housewife into the licensees' stores over and over and over" (App. III, 267); and that it "would be reasonable" for S&H to conduct its business so that its redemption merchandise could be obtained only by those who patronize S&H licensees and not by those who patronize others (App. III, 276).

Morris Rance, a trading stamp exchange operator called by Commission counsel, admitted that his business eliminated the necessity for stamp savers to patronize S&H licensees to get S&H stamps (App. III, 176-77). Nelson Freeman, an S&H licensee called by Commission counsel, testified that S&H's service would not be worth very much to him if he paid for the stamp service and the consumer could take the S&H stamps instead to another retailer for redemption (App. III, 210).

Another S&H licensee called by Commission counsel, Samuel Caplan, testified that for the consumer to take his stamps to another retailer for redemption would be objectionable since the latter "had no hand in this transaction. He would be profiting from something that he didn't make possible at all" (App. III, 250). Later he testified that he would feel that if his customers "could go across the street and get the S&H Green Stamps" at a trading stamp exchange he "would be deprived of part of what [he] had been paying The Sperry and Hutchinson Company for" (App. III, 250-51). Morris Lewis, an S&H licensee, testified that trading stamps "would lose a great deal of [their] advantage" if customers could swap or purchase S&H stamps at a trading stamp exchange (App. III, 323).

Still another S&H licensee, Frank McDonald, owner of a supermarket chain in Tennessee, who had experience with a competitor offering to exchange S&H stamps for his own brand of stamps (App. III, 369), testified that the effect of this activity was to "damage our business, and hence the impact was a serious one as far as we were concerned" (App. III, 371). He added that the competitor "was trying to tear down" and detract "from something that we had paid for with good money, exclusively, and we felt he had no right to participate in any gains thereby from it" (App. III, 372).

The Commission's efforts (App. I, 172) to denigrate S&H's expert witnesses were utterly without justification. Dr. Charles F. Phillips, then President of Bates College, is one of the country's leading experts in marketing, consumer motivation and trading stamps. His publications, the titles of which filled 10 pages of the record (App. II, 578-87), consist of 13 books, including four leading textbooks on marketing, and over 96 articles. Dr. Eugene Beem, Vice President for Corporate Research of S&H, who had formerly been Assistant Professor of Business Administration at the Uni-

versity of California, has devoted a substantial portion of his professional life to the study of consumer motivation as it relates to trading stamps (App. III, 345-47). Their testimony, far from constituting "broad generalities," was precise, to the point and consistent. At the hearing Commission counsel offered no contrary evidence. The Commission's failure even to consider this testimony was clearly erroneous.

The Commission in its opinion and petitioner (Pet. Br. 32) make much of what they term S&H's failure to offer what they call "hard facts" to support S&H's position. Petitioner points to the lack of testimony of business actually lost by S&H licensees because of a trading stamp exchange. The fact of the matter is, however, that commercial trafficking in trading stamps has been held unlawful and has been enjoined by the courts ever since the first attempts to engage in this conduct 67 years ago. Therefore, as the Commission agreed, there was no way in which S&H could have introduced "hard facts," in the sense of actual losses of business, "to show what would be the effect if such operations were continued over a period of time" (App. I, 172).

The Commission, while conceding the impossibility of demonstrating by actual experience what the effects of unauthorized trafficking would be on S&H's business, ignored both S&H's and the Commission's witnesses and, by selecting and distorting isolated bits of evidence in the record, arrived at the erroneous conclusion that such trafficking would not be detrimental to S&H.

The speculative character of this conclusion is exemplified by the Commission's reliance upon the fact that S&H doubled the size of its Fort Worth warehouse in 1964 as the basis for its non sequitur, which petitioner repeats in its brief (Pet. Br. 33), that "the evidence seems to indicate" an increase in S&H's business in the Oklahoma-Texas area "where trading stamp exchanges did do business with some

regularity before their operations were curtailed" (App. I, 172-73). The fact is that well before the expansion of the warehouse the courts of Oklahoma and Texas had enjoined the unauthorized trafficking in S&H stamps.[13] As a consequence, S&H's business was protected from injury by trading stamp exchanges in that geographic area. Moreover, it clearly does not follow from the fact that S&H's business may have increased in the Texas-Oklahoma area that unauthorized dealings in its stamps would not harm S&H. As this Court said in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U. S. 685, 702 (1967), the fact that a company has "increased its sales volume" does not mean that it has not been injured by unlawful practices. The Commission's conclusion disregards an almost unlimited number of other possible reasons to account for the addition to the warehouse.

The Commission also erroneously relied upon the assumptions (a) that there is "a great deal of exchanging of stamps between individuals" (App. I, 173); there "is evidence, for instance, that in 1960 some 20 percent of the stamps issued were exchanged by housewives on an informal basis" (App. I, 120); and there "is no evidence that such exchanges have been damaging" or "why the effect should be any different where the exchange is made through a commercial exchange"; and (b) that S&H encourages pooling of its stamps for charitable purposes which, said the Commission,

13. Thus, the Supreme Court of Oklahoma held that William Rance's trading stamp exchange was a "wrongful and unwarranted interference with plaintiff's business," and it affirmed a 1962 injunction restraining trafficking in S&H stamps. Rance v. Sperry & Hutchinson Co., 410 P. 2d 859 (Okla. Sup. Ct.), *cert. denied,* 382 U. S. 945 (1965). In Texas, the court held that the operation of a trading stamp exchange "unlawfully interferes" with contracts between S&H and its licensees, and it enjoined the trading stamp exchange from trading in S&H stamps. Sperry & Hutchinson Co. v. Hinds, District Court of Dallas County, Texas, No. 55,615-D, March 15, 1961 (unreported) (App. II, 555-58).

reduces or eliminates "some of the various elements which" S&H "claims are essential to the effective operation of its business" (App. I, 173).

The Commission completely misread the evidence concerning informal exchanges of stamps by housewives. The only evidence on the subject was a survey taken in 1960 (App. III, 513) which revealed that only 20 percent of the persons questioned "*ever* exchange stamps." The indication that 20 percent of stamp savers might *at some time* exchange stamps cannot mean, as the Commission says, that "in 1960 some 20 percent of the [S&H] stamps issued were exchanged" (App. I, 120, 173). The Commission's misinterpretation was relied upon in reaching its erroneous ultimate conclusion that the exchanges were not damaging to S&H, and the error has been perpetuated by petitioner (Pet. Br. 34).

S&H's program of encouraging the pooling of its stamps for charitable purposes in no way supports the Commission's finding that commercial trafficking in its stamps causes no injury to S&H. Contrary to the Commission's assumption, the remembrance value of the redemption merchandise and the continued patronage of S&H licensees are both very much a part of the program when S&H assists, for example, a hospital group to obtain an ambulance. The program is limited to the pooling of S&H stamps which S&H then redeems; no swapping of other stamps or outside redemption is involved. In addition to the good public relations inherent in the program, more consumers are attracted to S&H licensees in order to acquire stamps for the charitable program (App. III, 344). Thus, the pooling program and its effects on S&H are quite different from commercial trafficking, and that program offers no support for any conclusion concerning the effect of commercial trafficking on S&H's business.

The failure of the Commission to support its erroneous conclusion with findings or reference to any substantial

evidence is not cured by petitioner's brief here. Petitioner argues from a study indicating that the "availability of stamps [plays] a comparatively minor role in influencing consumer choice", that S&H's business "would not be seriously affected" if S&H stamps were indiscriminately available (Pet. Br. 34-35). If "about 16 percent" of consumers now "go out of their way to get the stamps they save" (Pet. Br. 34), fewer would do so if they could secure them other than at S&H licensee-retailers or secure competitive stamps freely convertible into S&H stamps. Obviously, such a lessening of the effectiveness of the promotion would seriously injure S&H licensees and cause many of them to give up the S&H service.

As the court of appeals observed, the exchanging of stamps by trading stamp exchanges and retailers would have the effect of making "all stamps interchangeable" and reduce the effectiveness of S&H stamps "as against other trading stamp companies," thereby "restrain[ing] competition between S. & H. and other stamp companies" (App. III, 393-94). The court declared that "[s]uch restructuring of the industry to eliminate competitive distinctions and to reduce all competitors to a common level is exactly what the Supreme Court condemned in *Federal Trade Commission* v. *Sinclair Refining Company,* 261 U. S. 463, 475 (1923)" (App. III, 394).

The Commission did not even consider the effect of its proposed order on competition among trading stamp companies. If it had done so, it could only have found that if stamps became interchangeable trading stamp companies would no longer be able to compete with each other at the level at which competition is most meaningful, *i.e.,* in the promotion of their licensees' sales. The court below correctly pointed out this failure of the Commission in its decision.

2. S&H's Actions Were Not Unfair to Consumers or Others

(a) *Consumers*

As we have noted, the principal ground urged by counsel for petitioner in seeking to reinstate the Commission's order is that S&H's actions were "unfair to consumers." In attempting (Pet. Br. 28-29) to demonstrate this alleged unfairness, however, counsel rely not on the findings of the Commission[14], which were not directed to the consumer, but entirely on their own rationalizations as to how the consumer might be hurt.

Petitioner does cite (Pet. Br. 28) the only mention of the consumer in the opinion which was a passing reference to the examiner's finding that S&H's actions had "disadvantaged the stamp collecting consumers who did not have, after [S&H's] actions, the same freedom of choice in the disposition of trading stamps" (App. I, 176).[15] The examiner recognized that this "freedom of choice" was a mere "convenience" for the consumer which did not outweigh the legitimate purpose of S&H's policies (App. I, 78).

The Commission could not have regarded this limitation on the consumer's rights to be of any particular significance, because it never again alluded to it. It was not the basis of the Commission's decision, since the Commission deemed it "essential . . . to determine whether or not there has been or may be an impairment of competition" (App. I, 175).

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14. In its findings of fact the Commission made no mention of the effect of S&H practices on the consumer except its ultimate finding that the effect of S&H's actions was "to the detriment of [retailers and trading stamp exchanges] and the consuming public" (App. I, 126). Petitioner rightfully placed no reliance upon that naked ultimate conclusion and did not cite it in its brief.

15. In fact, the examiner's finding was that, after S&H's actions, the stamp collector had *"less of a choice . . . than she would have had if she could have used the stamps as currency anywhere she chose"* (App. I, 73) (emphasis added). The fact that trading stamps may not be used as currency does not mean that the limitations placed by S&H on the use of its trading stamps are not reasonable.

On appeal, counsel have asked this Court to undertake a burden which the Commission itself did not assume: to find that the limitation of consumer choice mentioned by the examiner injured the consumer and to conclude that injury to consumers alone could be a proper basis for the Commission's decision.

Without benefit of Commission findings, counsel first contend that consumers are prevented from deriving "full value" or "maximum value" from their stamps (Pet. Br. 16, 28). That the consumer who fills a book of stamps and redeems it in the prescribed manner receives full value for her stamps is clear and undisputed. The Commission found (App. I, 106, 109) and counsel agree (Pet. Br. 5, n. 4) that the average retail value of a book of stamps when redeemed at an S&H redemption center is $3.00, an amount considerably greater than the average price per book ($2.68) which the merchant pays for the stamp service.

Thus, to obtain full value for her stamps a consumer need only (1) fill one book of S&H stamps and (2) redeem them from S&H at a redemption center or by mail. Both of these requirements may be easily fulfilled. Since there are over 70,000 retail outlets issuing S&H stamps (App. I, 104), all consumers have an ample opportunity to fill a book of stamps within a reasonable period. Furthermore, as there are "over 850 redemption centers" maintained by S&H throughout the country and "[s]tamp savers who are not located near a redemption center may redeem stamps by" mail (App. I, 108), no saver would be prevented from redeeming S&H stamps wherever she may move.[16] At an S&H redemption center she is able to select from over 2,000 available articles (App. I, 108), encompassing a wide range

16. Counsel for the petitioner themselves refer approvingly in their brief to the "quality of [S&H's] merchandise and its nationwide operations" (Pet. Br. 35).

of items, including such basic necessities as clothing, furniture and household goods.

Accordingly, while the consumer may not have absolute "freedom of choice" to dispose of her stamps as if they were currency, she is not prevented from realizing full value for them. Concededly, it may occasionally be more convenient for a stamp saver to redeem S&H stamps at a nearby merchant rather than go to an S&H redemption center. Or she may prefer to obtain a different item than one of the over 2,000 made available by S&H which the examiner found to be of "high quality" and "made by well-known, reliable, manufacturers" (App. I, 97). But there is a vast difference between this type of inconvenience and the "serious detriment" which must be found before a practice may be considered to be unfair. As the examiner properly concluded, "Section 5 of the Federal Trade Commission Act does not empower the Commission to exercise its powers solely for convenience of consumers—only to prevent unfair acts and practices" (App. I, 78).

In support of its contention that *any* limitation of the consumer's disposition of trading stamps is improper, petitioner suggests, also without benefit of Commission findings or record support, that trading stamps "ordinarily" raise the price of merchandise (Pet. Br. 28) and therefore, since the consumer indirectly pays for trading stamps, she should have the right to use them as she chooses. The uncontroverted evidence of record, however, established that "[t]here is no evidence that trading stamps are ordinarily accompanied by price increases" (Tr. 6465-66; *see also* Tr. 6470, 6601).

Petitioner further argues that if trading stamp exchanges and others were permitted to redeem and exchange S&H stamps, a higher percentage of S&H stamps would be redeemed and consumers as a whole would thereby derive greater values from their stamps (Pet. Br. 28-29).

Underlying this conjecture is the improper inference that 14 percent of all S&H stamps are never redeemed. The fact is that although 14 percent of all stamps issued by S&H through the end of 1964 were still outstanding as of December 31, 1964 (App. I, 109), some 13 percent of all S&H stamps were issued in 1964 alone (App. II, 433-34), and the bulk of those stamps would not ordinarily be redeemed until the following year (Tr. 6279). Accordingly, the actual redemption rate is unquestionably at the top of the 86 percent to 95 percent range which the Commission found for S&H trading stamp redemptions (App. I, 109). Furthermore, there is no support in the record for the claim that a higher percentage of S&H stamps would be redeemed by consumers if they could be freely transferred, and the Commission made no such finding. There was no showing that consumers who do not now save or redeem S&H stamps would collect such stamps for redemption or exchange them at trading stamp exchanges or other outlets. Finally, as the examiner found, "[u]nredeemed stamps do not represent a 'windfall' to S&H. Competition requires the Company to pass on to its stamp savers and to its licensees the savings represented by the unredeemed stamps" (App. I, 95).[17]

In brief, the requirements of the S&H system are clearly reasonable. Whatever added convenience the consumer may be able to derive from the ability to redeem or trade her stamps at a competitive retailer or at a trading stamp exchange is more than outweighed by the fact that such activity would serve to defeat the promotional value of trading stamps.

17. Petitioner asserts that unredeemed stamps represent an "obvious advantage" to S&H and implies that S&H seeks to increase this "waste" (Pet. Br. 36-37). In fact, as the examiner found: "As a matter of policy, the Company makes every effort to encourage and facilitate redemptions because it believes that a high rate of redemptions is important to the continued participation of retail merchants and their customers in its trading stamp service" (App. I, 41).

(b) *Retail Merchants and Trading Stamp Exchanges*

In the course of its attempt to elevate minimal inconvenience to consumers to the level of unfairness under Section 5, petitioner also briefly urges that S&H's practices are unfair to trading stamp exchanges and to retailers who offer to redeem stamps for their merchandise (Pet. Br. 29-31). S&H's attempts to prevent unauthorized use of its stamps have not unfairly curtailed the legitimate business operations of merchants at any level.

The Commission found that certain retail merchants, not authorized licensees of S&H, had sought to "lure customers into their stores" by offering to redeem S&H stamps with merchandise or to trade their own stamps for S&H stamps (App. I, 119). This, it found, was "a practical and effective response to stamp competition" and "might" even be the "most effective response" to such competition (App. I, 178). Petitioner's brief defends retailers who engage in such practices by asserting, without the aid of any Commission finding, that they "perform a valuable service to the consuming public" (Pet. Br. 30).

Obviously, the use of the promotional attraction of the S&H system without paying for it may be an "effective" way to "lure" consumers away from S&H's licensees,[18] just as any interference with a competitor's business and contractual obligations may be an "effective" response to his competition. Fortunately, however, the courts recognize that such practices constitute unfair methods of competition which should be enjoined. It is no answer to say that such practices are "effective."

18. For this reason it is equally obvious that S&H's licensees are hurt by this activity. The Commission's findings that on the one hand such conduct was effective in benefiting competitors at the expense of S&H licensees and that on the other hand it did not injure S&H cannot be reconciled.

According to petitioner, the availability of trading stamps plays "a comparatively minor role in influencing consumer choice" (Pet. Br. 35). Since many other and equivalent methods of competition (including price reductions, other promotions and other trading stamps) are available to unlicensed retail merchants, a retailer who is restrained from unfairly interfering with the S&H system can nonetheless compete effectively, but fairly, with S&H licensees. Under these circumstances, S&H's practice of seeking the aid of the courts to protect its business from the illegitimate competition of such merchants is not unfair. *See United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365, 376 (1967); *Topps Chewing Gum, Inc.,* 67 F.T.C. 744, 840-41 (1965).

Counsel's assertion that retailers who offer merchandise or their own stamps in exchange for S&H stamps "perform a valuable service to the consuming public" (Pet. Br. 30) would be no excuse for unfair competition even if it were true (and the Commission itself made no such finding). Any unfair competitor, whether he is stealing trade secrets, palming off his products as those of another or interfering with the business of other merchants, may perform a service or satisfy the immediate needs of consumers who trade with him, but his unscrupulous conduct is nonetheless unlawful if it violates the rights of others.

Although S&H has been charged with unfairly suppressing the operations of trading stamp exchanges, it is, as the court below observed, "court action" which "has no doubt injured the businesses of traffickers" (App. III, 391). *Every* successful court action to enjoin an unfair business practice may injure the business of the firm engaged in such practice, and, if the firm is engaged solely in the unfair practice, may destroy it.[19] *See Slough* v. *FTC,* 396 F. 2d 870, 872 (5th Cir. 1968), *cert. denied,* 393 U.S. 980 (1968), where it was

19. It should be noted, however, that S&H has never sued to stop trafficking in any stamp but its own.

held that a person engaged in an unfair method of competition cannot object to a cease and desist order prohibiting such conduct on the ground that the order would prevent him from continuing in business.

The essential question, therefore, is not whether the exchange operators were injured, but whether the activities in which they were engaged were unfair and consequently unlawful. If, as we have urged, the conditions placed by S&H on the use of its stamps are reasonably necessary to fulfill the promotional purposes of the S&H system, it follows that the operations of the trading stamp exchanges, which induce and participate in the breach of these conditions, are improper. It is for this reason that these activities have been uniformly condemned by the courts.

3. The Legitimacy of S&H's Actions Has Been Uniformly Recognized By State and Federal Court Decisions. The Commission Erroneously Ignored These Decisions Upholding S&H's Right to Injunctive Relief Against Unfair Competition.

From 1904 to 1966, S&H was a party to 43 actions in 19 states and eight federal districts brought to restrain the unauthorized use of trading stamps by retailers, trading stamp exchanges and others, and each case resulted in an injunction against the defendant. In addition to unanimous condemnation by the courts, unauthorized trafficking in trading stamps has been outlawed by statutes of four states.[20]

The facts relied upon by the courts in enjoining the unauthorized use of S&H stamps are the same as those shown on the present record. Thus, the courts have found that unauthorized trafficking in S&H stamps destroys the effectiveness of the S&H franchise and tends to eliminate the inducement for merchants to deal with S&H, *Sperry & Hutchinson*

20. Cited at p. 5, *supra*.

Co. v. *Temple,* 137 F. 992 (C. C. D. Mass. 1905); prevents the trading stamp company from "establishing a closer and continuous relation" with its stamp savers, *Sperry & Hutchinson Co.* v. *Siegel, Cooper & Co.,* 309 Ill. 193, 202, 140 N.E. 864, 867 (1923); tends to interrupt the continuous patronage of S&H licensees by stamp savers, *Sperry & Hutchinson Co.* v. *Louis Weber & Co.,* 161 F. 219, 221 (C. C. N. D. Ill. 1908); *Rance* v. *Sperry & Hutchinson Co.,* 410 P.2d 859 (Okla. Sup. Ct.), *cert. denied,* 382 U.S. 945 (1965); *Sperry & Hutchinson Co.* v. *Berkeley,* 44 Misc.2d 331, 253 N.Y.S. 2d 700, 702 (Sup. Ct. 1963), *aff'd,* 254 N.Y.S. 2d 231 (4th Dept. 1964), *appeal denied,* 15 N.Y.2d 486, 207 N.E.2d 622 (1965); and interferes with the contracts between S&H and its licensees, *Sperry & Hutchinson Co.* v. *Louis Weber & Co., supra; Rance* v. *Sperry & Hutchinson Co., supra; Sperry & Hutchinson Co.* v. *Berkeley, supra.* These cases reveal that under facts identical to those before the Commission in this proceeding the unauthorized commercial use of S&H stamps has been found to constitute unfair competition and declared unlawful.

In *Rance,* the most recent of the reported decisions involving the unauthorized use of S&H's stamps, S&H sought to enjoin William Rance from trafficking in S&H stamps at his trading stamp exchange. Rance contended that stamp collectors acquire title to the stamps, that the stamps are articles of commerce, and that S&H's attempt to reserve title to, and restrict the transferability of, its stamps was an unlawful restraint of trade under common law principles and state and federal antitrust laws. In rejecting those contentions, the Oklahoma Supreme Court cited with approval numerous decisions holding in effect that trading stamps were unlike typical articles of commerce or negotiable instruments, and that limitation of their transferability is valid. Trading stamps were recognized to be a promotional device whose effectiveness would be destroyed

if they could be used commercially without restriction. The unauthorized commercial use of S&H stamps was found to be "so inconsistent with the purposes for which the same were issued, and so destructive to a legal method of doing business, that such action should be enjoined." 410 P.2d at 869.

In another recent decision, *Sperry & Hutchinson Co.* v. *Berkeley, supra,* the court enjoined defendant's trading in S&H stamps, noting that "[t]he restrictions of the various stamp companies against the transferability of their respective trading stamps have been uniformly enforced by the Courts," and held that the trading in S&H's stamps "unlawfully interferes with the fulfillment of its contract with its licensees and their customers," and "constitutes unfair competition." 253 N.Y.S.2d at 703.

These cases and statutes clearly represent an unequivocal expression of public policy among the states which the Commission should have considered. *Asheville Tobacco Board of Trade, Inc.* v. *FTC,* 263 F.2d 502, 512 (4th Cir. 1959). The Commission's opinion, however, reveals that no analysis was made nor any consideration given to the law of these cases (nor the statutes), despite the fact that they form an important part of the law of unfair competition which the Commission itself is enjoined to apply in interpreting Section 5 of the Act, as noted in Point IIA dealing with the legislative history of the Section.[21]

Petitioner attempts to fill the void in the Commission's decision with several irrelevant arguments. First, petitioner states that "federal regulatory authority is not necessarily bound by inconsistent state law" (Pet. Br. 38).

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21. Petitioner's intimation (Pet. Br. 39, 42) that the Commission actually considered those decisions and concluded to take action despite them is inaccurate and is not supported by petitioner's reference to "App. I, 149." The fact is that the Commission never considered the law of unfair competition as found in those cases.

S&H has never contended, however, nor did the court of appeals hold, that any or all of the authorities upholding S&H's position foreclose the Commission.[22] The point is that, together, they form a body of law in which the courts have recognized, both before and after the passage of the Act, that unauthorized commercial use of trading stamps is an unfair, unjust and inequitable trade practice. The Commission, as any other administrative tribunal, may not simply ignore such a body of law, particularly when it is so important to a proper interpretation of the Act which the Commission was created to administer.

Petitioner next contends that there is "no uniform policy among the states approving restrictions on the use of trading stamps" (Pet. Br. 39). As far as restrictions on the unauthorized use of stamps are concerned (which is the only issue raised by this petition), petitioner is dead wrong. Naturally, trading stamp companies, like other businesses whose contractual obligations are to be performed in the future, have been the subject of regulatory legislation governing their operations. No state, however, has ever permitted commercial trafficking in trading stamps by retailers and brokers attempting to take a free ride on the trading stamp system. To the contrary, for nearly seventy years every state in which the question has arisen, whether in its courts or in its legislature, has emphatically declared such trafficking to be unfair and unlawful.

Petitioner also argues (Pet. Br. 39) that state courts simply determine "the rights of parties to private litiga-

22. Petitioner's second "Question Presented" (Pet. Br. 2) asks "Whether decisions under state law .... *foreclose* the Commission from declaring such restraints to be unfair within the meaning of Section 5." The court of appeals' decision neither holds nor suggests that the Commission was *foreclosed* by such decisions, and petitioner, in the body of its brief, never again mentions any such foreclosure. Thus, the petitioner's second "Question Presented" does not encompass an issue properly to be considered by this Court.

tion" while the Commission acts in "the public interest." This distinction is invalid under our system of jurisprudence, as this Court has recognized. *Garner* v. *Teamsters Local 776,* 346 U. S. 485, 500 (1953). State courts, particularly when exercising equity injunction powers as in the 43 cases involving S&H, also act in vindication of the public interest. "A court of equity will not use its power to produce a result contrary to public policy. . . ." *Columbia Auto Loan, Inc.* v. *Jordan,* 196 F.2d 568, 571 (D.C. Cir. 1952). Furthermore, the state statutes prohibiting unauthorized use of stamps are, of course, clear expressions of the public interest. It could hardly further the public interest to have the Commission promote activities which have been condemned as unlawful and unfair competition by every court and legislature which has passed on the matter since the beginning of the trading stamp industry over seventy years ago.

Petitioner further argues that some of the court decisions involved the reissuance of S&H stamps by unlicensed merchants, a practice which S&H would still have the right to prevent under the Commission's order (Pet. Br. 41-42).[23] Again, however, the distinction emphasized by petitioner (and by the Commission in its order) is meaningless, and the courts have never distinguished between the two practices. It makes little difference whether an unlicensed merchant offers to redeem S&H stamps for his merchandise or attempts to reissue the stamps to his customers after he acquires them. In either case, the unlicensed merchant is attempting to take a free ride on the S&H system at the expense of licensees who have paid for it, and in either case he has damaged S&H's ability to perform its contracts with its licensees.

23. In fact, one of the "reissuance" cases cited by petitioner, Sperry & Hutchinson Co. v. Louis Weber & Co., 161 F. 219 (C.C.N.D. Ill. 1908), actually involved redemption by a retailer of S&H stamps in exchange for his own stamps.

While the many cases to which S&H has been a party, together with state laws which have been enacted, represent a clear expression of public policy regarding unauthorized trafficking in trading stamps which extends back to antedate the Federal Trade Commission Act itself, it should be emphasized that, in arriving at their decisions, the courts have not applied special rules unique to trading stamps. The same principles of unfair competition have been applied in other cases bearing striking similarities to the unauthorized use of S&H stamps. *See Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236 (1905); *Addison-Wesley Publishing Co.* v. *Brown*, 207 F. Supp. 678 (E.D.N.Y. 1962); *Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Meyer* v. *Hurwitz*, 5 F.2d 370 (E.D. Pa. 1925), *aff'd*, 10 F.2d 1019 (3d Cir. 1926).

Limitations on the transferability of trading stamps are also not unique. The right of railroads to insist on the nontransferability of and prevent the unauthorized commercial trafficking in their tickets was upheld in *Bitterman* v. *Louisville & N.R.R.*, 207 U. S. 205 (1907); *Nashville, C. & St. L. Ry.* v. *McConnell*, 82 F. 65 (C.C.M.D. Tenn. 1897); *Kirby* v. *Union Pac. Ry.*, 51 Colo. 509, 119 P. 1042 (1911); *Schuback* v. *McDonald*, 179 Mo. 163, 78 S.W. 1020 (1903), *appeal dismissed*, 196 U. S. 644 (1905); *Post* v. *Chicago & N.W.R.R.*, 14 Neb. 110, 15 N.W. 225 (1883); *Eastman* v. *Maine Cent. R.R.*, 70 N.H. 240, 46 A. 54 (1900); and *Lytle* v. *Galveston, H. & S.A. Ry.*, 100 Tex. 292, 99 S.W. 396 (1907).

Courts have similarly enforced restrictions on the trafficking in theater and other amusement tickets by unauthorized persons, even to the extent of affirming the right to refuse admission to persons who bought tickets from such unauthorized persons. *Collister* v. *Hayman*, 183 N. Y. 250, 76 N.E. 20 (1905); *Levine* v. *Brooklyn National League Baseball Club*, 179 Misc. 22, 36 N.Y.S. 2d 474 (Sup. Ct.

1942). Concerning the non-transferability of coupons, see *People* v. *Berger,* 142 Misc. 178, 254 N.Y.S. 136 (Gen. Sess. 1931).

In *Bitterman,* defendants were ticket brokers who had acquired and resold unused return trip portions of reduced rate railroad tickets issued to travelers attending large conventions in New Orleans. This Court, after citing with approval one of the cases upholding S&H's right to obtain injunctive relief against unauthorized trafficking in trading stamps, *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.,* 128 F.800 (C.C.D.R.I. 1904), affirmed the railroad's right to prevent the unauthorized trafficking in its tickets. The Commission attempted to distinguish *Bitterman* and the theater ticket cases on the ground that they "involve public interest considerations such as rate regulation and abuses of ticket speculation" (App. I, 174 n.19). It is clear from the opinion, however, that the Court decided *Bitterman* upon the principle that "an actionable wrong is committed by one who 'maliciously interferes in a contract'" specifying that railroad tickets shall not be resold, in "disregard of the rights of a carrier, causing injury to it, which the business of purchasing and selling non-transferable reduced rate tickets of necessity involved." 207 U.S. at 222-23. In none of the railroad cases was "rate regulation" a significant factor, and the "abuses" of stamp speculation are no less reprehensible than those of ticket speculation.

The crucial element of unfairness found in the foregoing cases is that each defendant went far beyond mere copying of the plaintiff's product, as was the case in *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U.S. 225 (1964), and *Compco Corp.* v. *Day-Brite Lighting Inc.,* 376 U.S. 234 (1964), cited by petitioner, and actually interfered with the plaintiff's contracts and business relationships thereby frustrating his ability to conduct his business successfully.

Unauthorized users of S&H stamps operate in just such a manner; they interfere with and reduce the value of S&H's franchise agreements. Their activities constitute "a clear case of unfair competition." *Sperry & Hutchinson Co.* v. *Louis Weber & Co.*, 161 F. at 222. *See also Sperry & Hutchinson Co.* v. *Berkeley,* 253 N.Y.S.2d at 703.

It seems inconceivable that the enforcement of the common law right to enjoin interference with one's business relations by others can be held to violate Section 5 when such right is exercised by a trading stamp company as distinguished from a railroad, a theater or an issuer of coupons. Of course, a person engaged in unauthorized trafficking in trading stamps is hurt in his "business" of trafficking just as the defendant in *Bitterman* was hurt in his "business of purchasing and selling non-transferable reduced rate tickets." 207 U.S. at 223. Such "business" activities, however, are not protected by Section 5, inasmuch as they are unfair and subject to injunction under common law.

POINT III

Petitioner improperly seeks to reinstate the Commission's order on a basis not relied upon by the Commission.

Petitioner asks this Court to reinstate the Commission's order on a ground not relied upon by the Commission, namely, that S&H's activities were "unfair to consumers, regardless of whether they also are anticompetitive" (Pet. Br. 15). To do so would violate the principle that "[the Commission's] action must be measured by what the Commission did, not by what it might have done." *SEC* v. *Chenery Corp.,* 318 U.S. 80, 93-94 (1943). A review of the Commission's findings 60-88 (App. I, 119-126) will satisfy the Court that the Commission was not dealing with the

effect of S&H's practices on consumers, but rather with their competitive effect on trading stamp exchanges and on merchants competing with S&H licensees. Only in the ultimate finding is there the conclusory statement, without supporting findings, that S&H acted to the "detriment of the persons engaged therein [exchanges and competing merchants] and the consuming public" (App. I, 126).

In *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-69 (1962), this Court said:

> "'. . .unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.'"
>
> ". . . The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself. . . ."

If any conclusion is certain, it is that the Commission did not articulate the alleged harm to consumers on which petitioner now relies as the basis for its request that the Commission's order be reinstated.[24] For the reasons stated, this Court should refuse to review this case on a basis not relied upon by the Commission.

24. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), in which this Court reiterated that *"post hoc"* rationalizations "have traditionally been found to be an inadequate basis for review," 401 U.S. at 419, and in which Mr. Justice Black, in concurring, referred to "some too-late formulations, apparently coming from the Solicitor General's office." 401 U.S. at 422. *See also* NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 443-44 (1965); WAIT Radio v. FCC, 418 F.2d 1153, 1158 (D.C. Cir. 1969).

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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